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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

<p>SAMSON TUG AND BARGE CO., INC., an Alaska Corporation</p> <p>Plaintiff/Appellant</p> <p>v.</p> <p>UNITED STATES OF AMERICA,</p> <p>acting by and through</p> <p>the UNITED STATES DEPARTMENT of the NAVY MILITARY SEALIFT COMMAND, and UNITED STATES DEPARTMENT OF THE ARMY MILITARY TRAFFIC MANAGEMENT COMMAND</p> <p>Defendants/Appellees</p>	<p>) Civil No. A03-006 CV</p> <p>) IN ADMIRALTY</p> <p>) SUR-REPLY OF</p> <p>) DEFENDANT, UNITED STATES</p> <p>) OF AMERICA, TO PLAINTIFF'S</p> <p>) MOTION IN LIMINE TO</p> <p>) EXCLUDE GOVERNMENT</p> <p>) WITNESSES AND/OR PRECLUDE</p> <p>) OTHER PROOF AT TRIAL</p>
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1 The Government's Sur-Reply addresses only the issue of the diversion of cargo to air.
2 The United States relies on its previous opposition memorandum with regard to the
3 remainder of plaintiff's motions.

4 Plaintiff Samson offers new material in its Reply to the Government's Opposition to
5 Samson's Motion *in Limine*. This consists of a letter sent on its behalf during discovery
6 (Ex.1), portions of the deposition testimony of two Government witnesses (Exs. 2 and 3), a
7 few pages from a Command History (Ex. 4) and some printouts of flights which include
8 cargo data (Ex. 5). It is improper for a moving party to belatedly offer items to support its
9 underlying Motion for the first time with its Reply papers. *See, Provenz v. Miller*, 102 F.3d
10 1478 (9th Cir. 1996), *cert. denied*, 522 U.S. 808, 118 S.Ct. 48, 139 L.Ed.2d 14 (1997). The
11 "new" exhibits were all available to Samson at the time it brought its Motion initially, and
12 should have been offered at that time. They should be stricken on this basis alone.
13 Moreover, like those few items attached to its Motion, none of the items attached to its Reply
14 have been properly authenticated by way of sworn affidavit, declaration or deposition
15 testimony. Also, the excerpts of the two depositions must be disregarded under Ninth Circuit
16 precedent mandating that deposition testimony be submitted with a copy of the Court
17 Reporter's certification. *See, Orr v. Bank of America*, 285 F.3d 764, 774 (9th Cir. 2002);
18 Fed.R.Civ.P. 30(f)(1). In addition, foundational objections were interposed by Government
19 counsel during Mr. Clarke's testimony on the subject of possible air cargo records, which is
20 evident from those portions of his testimony attached by plaintiff. Those objections remain
21 unresolved. Also, the excerpts offered from Volume II of Mr. Peterson's testimony appear
22 irrelevant to the subject at hand.

23 It should be emphasized that the exact relief plaintiff Samson is seeking from its
24 Motion *in Limine* with regard to the alleged diversion to air remains unclear. It variously
25 asks the Court to preclude the United States (1) from relying on theories and positions which
26 would have been supported or refuted by documents known to have existed at one time and
27 in the sole possession of the Government; (2) from calling any witness to testify regarding
28 choice of transportation modality; and/or (3) from presenting any defense on liability or

1 damages based on some allegedly spoliated documents. To the extent Samson is actually
2 seeking to thereby obtain a partial summary adjudication in this case, i.e. to establish that
3 there was an alleged diversion of a supposedly significant amount of barge appropriate cargo
4 moving between the continental United States and Adak to air transport, it has the burden of
5 demonstrating the absence of **any** genuine relevant issue of material fact on that issue,
6 pursuant to Fed. R. Civ. Pro. 56, Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L.Ed.2d
7 265, 106 S.Ct 2548, 2553 (1986), and any inferences to be drawn from the evidence
8 submitted with the moving party's motion must be viewed in the light most favorable to the
9 party opposing it, here the defendant United States. United States v. Diebold, Inc., 369 U.S.
10 654, 655, 8 L.Ed.2d 176, 82 S.Ct. 993, 994 (1962). In its opposition memorandum, the
11 United States offered sworn testimony by a number of knowledgeable witnesses that personal
12 property, vehicles, equipment, etc., were left behind on the island and that there was no airlift
13 of material off the island. For its part, Samson has not really offered any "evidence" in
14 support of its position.

15 Unable to prove a diversion occurred directly because no documents or testimony
16 supports that proposal, Samson instead argues that it is entitled to preclude proof by the
17 Government based on a theory of spoliation. Yet it also has not carried its burden of proof
18 on spoliation. It has not established that relevant documents actually existed at some time,
19 let alone that they were in the possession of the United States, and that the particular
20 Government agencies which might have been in possession of them were also on notice of
21 pending related litigation, and further that their destruction occurred after such notice was
22 obtained. Even if its 1997 FOIA letters were authenticated, which they have not been, and
23 they and their author had been properly disclosed and produced herein, which they were not,
24 those letters would still not serve as any proof that the potentially correct Government
25 custodian of any relevant air cargo documents had actual notice of potential litigation
26 involving the documents at a time when they still existed and were still in the Government's
27 possession, assuming they ever did or were. The 1997 letters were merely FOIA requests
28 for copies of documents, not sufficient to inform an agency of the Government of the need

1 to preserve specific material for use in litigation per se. Indeed, no litigation need, actual or
2 even potential, is articulated in those letters. Spoliation has not been found in cases where
3 the relation between the destroyed items to potential litigation was far more evident and
4 direct than is presented herein. *See, e.g., Wyler v. Korean Airlines Co.*, 928 F.2d 1167 (D.C.
5 Cir. 1991). Moreover, the Government has actually produced documents containing air
6 cargo information in response to later FOIA requests which were made on behalf of Samson,
7 and also during discovery after Samson brought this action in federal court. (See, Ex. 5 to
8 Plaintiff's Reply.) Therefore, Samson is not without evidence on the subject, both
9 documentary and testimonial.

10 Could some other, possibly relevant, material once have existed somewhere within
11 the Government for some period of time? It is possible, but that does not mean the material
12 was destroyed following notice to the relevant entities hat Samson might institute litigation
13 regarding its barge contract. If such items ever existed and were actually in the possession
14 of some Government agencies, they were most likely lost or destroyed during closure of the
15 base at Adak many years ago, or destroyed in the regular course pursuant to routine
16 document preservation and destruction practices then in place within whatever agency or
17 agencies held them. The purposes behind imposition of the spoliation doctrine would not be
18 served in such circumstances.

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1 Since there are clear issues of fact remaining between the parties on all diversion
2 allegations, summary adjudication is simply inappropriate, and Samson's motion, and
3 whatever relief is being sought therein, should accordingly be denied in its entirety..

4 Dated: 5/14/08

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11

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 5/14/08, a copy of the foregoing SUR-REPLY OF
THE UNITED STATES OF AMERICA, was served electronically on:

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